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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

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9 JUAN S. PULIDO-SANCHEZ,
10 Plaintiff,

11 v.

12 BANK OF NEW YORK MELLON FKA
13 BANK OF NEW YORK,
14 Defendant.

Case No. 2:13-cv-001262-APG-GWF

**ORDER GRANTING MOTION TO
DISMISS FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN
BE GRANTED**

15 Currently before the Court is Defendant Bank of New York Mellon's ("Defendant")
16 Motion to Dismiss With Prejudice for Failure to State a Claim Upon Which Relief Can Be
17 Granted (ECF#5).

18 **BACKGROUND**

19 In May 2006, Plaintiff, along with Selina Marie Cisneros, purchased the real property
20 located at 6259 Thunder Blitz Avenue, Las Vegas, Nevada 89131 ("Property"). (ECF#5-1.)
21 Plaintiff financed this purchase through a mortgage loan ("Loan") from Universal American
22 Mortgage Company, LLP. (*Id.*) Under the Deed of Trust, Stewart Title of Nevada acted as
23 trustee for the Loan, while Mortgage Electronic Registration Systems, Inc. ("MERS") was the
24 beneficiary. (*Id.* at 2.) On June 1, 2008, the borrowers defaulted on their mortgage obligation,
25 resulting in a Notice of Default and Election to Sell being recorded against the Property. (ECF#5-
26 2.) On October 7, 2008, MERS substituted ReconTrust in as trustee under the Deed of Trust.
27 (ECF#5-3.) On October 28, 2010, ReconTrust rescinded the Notice of Default. (ECF#5-4.) On
28 November 1, 2012, MERS assigned the Deed of Trust to Defendant. (ECF#5-5).

1 On February 20, 2013, Plaintiff sued Defendant in the Nevada state court (Case No. A-13-
2 677053-C) seeking damages and equitable relief. (ECF#1-1). The suit was subsequently
3 removed to this Court. Plaintiff asserts two claims in his Complaint: intentional
4 misrepresentation and negligent misrepresentation. (ECF#1-1 at 5, ¶ 3.) Plaintiff also seems to
5 argue that his Loan debt was satisfied because his mortgage was pooled and securitized. (ECF#1-
6 1 at 5, ¶¶ 4(2) and 4(3).) Plaintiff asks for “reconveyance of [the Property] free of levy and lien,
7 and equitable relief of \$375,000 plus legal fees.” (ECF#1-1 at 5, ¶ 5.)

8 On July 23, 2012, Defendant filed a Motion to Dismiss. (“Motion”). (ECF#5.) For the
9 reasons discussed below, the Court now grants Defendant’s Motion, in part.

11 DISCUSSION

12 A complaint must provide “[a] short and plain statement of the claim showing that the
13 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp v. Twombly*, 550 U.S.
14 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands “more
15 than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.”
16 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286
17 (1986)). “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
18 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
19 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at 1949 (internal
20 citation omitted).

21 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
22 when considering a motion to dismiss. First, the court must accept as true all well-pled factual
23 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
24 truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by
25 conclusory statements, do not suffice. *Id.* at 1949. Second, the Court must consider whether the
26 factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is
27 facially plausible when the complaint alleges facts that allow the court to draw a reasonable
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1 inference that the Defendant is liable for the alleged misconduct. *Id.* at 1949. Where the
 2 complaint does not permit the court to infer more than the mere possibility of misconduct, the
 3 complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal
 4 quotation marks omitted). When the claims in a complaint have not crossed the line from
 5 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

6 “Generally, a district court may not consider any material beyond the pleadings in ruling
 7 on a Rule 12(b)(6) motion. ... However, material which is properly submitted as part of the
 8 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
 9 *& Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). Similarly, “documents
 10 whose contents are alleged in a complaint and whose authenticity no party questions, but which
 11 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion
 12 to dismiss” without converting the motion to dismiss into a motion for summary judgment.
 13 *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994).

14 A. Quiet Title

15 Although Plaintiff has not expressly pled a claim for quiet title, the Court infers that
 16 Plaintiff is asserting that claim based on his vague allegations and prayer for relief. Specifically,
 17 Plaintiff seems to claim that his debt under the Note and Deed of Trust was satisfied because his
 18 mortgage loan was pooled and securitized. (ECF#1-1 at 5, ¶¶ 4(2) and 4(3).) His request for
 19 “reconveyance of [the Property] free of levy and lien” seems like a demand for quiet title.
 20 (ECF#1-1 at 5). “A quiet title action requests a judicial determination of all adverse claims to
 21 disputed property.” 65 Am. Jur 2d. Quieting Title and Determination of Adverse Claims § 1. In
 22 Nevada, “[a]n action may be brought by any person against another who claims an estate or
 23 interest in real property, adverse to him, for the purpose of determining such adverse claim.”
 24 NRS § 40.010.

25 The burden of proof in a quiet title action rests with the plaintiff to prove good title in
 26 himself. *See Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (Nev.1996).
 27 Thus, in order to obtain title to the Property “free of levy and lien” as Plaintiff requests, Plaintiff
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1 must prove that the Deed of Trust lien has been properly extinguished—that is, by payment of the
2 underlying Loan or by operation of law. Plaintiff's Complaint does not make out a plausible case
3 for either scenario.

4 Plaintiff fails to allege that he paid off his Loan; rather, he apparently defaulted on the
5 Loan by failing to make monthly payments on and after June 1, 2008. (ECF#5-2.) Plaintiff
6 vaguely suggests in his Complaint that the debt was satisfied because the Deed of Trust “was
7 pooled and securitized into [a] securitized trust.” (ECF #1-1 at 5, ¶ 4(2).) He also claims to have
8 “documentation verifying satisfaction of said [Deed of] Trust.” (*Id.*) Such conclusory allegations,
9 without more, are not sufficient to make out a plausible claim that the debt has been satisfied or
10 extinguished by operation of law. *Iqbal*, 129 S. Ct. at 1949. Therefore, Plaintiff's demand for
11 conveyance of the Property “free from levy and lien” fails under Rule 8(a).

12 The Court dismisses this claim without prejudice. Plaintiff may attempt to amend his
13 Complaint to include sufficiently detailed factual allegations that the Loan is not in default and
14 that the Deed of Trust has been extinguished as a matter of law.

15 **B. Intentional Misrepresentation**

16 Plaintiff appears to contend that Defendant misrepresented its ownership of the Deed of
17 Trust. (ECF #1-1 at 5, ¶ 4(4) and 4(5).) To state a claim for fraudulent misrepresentation in
18 Nevada, a plaintiff must allege that (1) defendant made a false representation; (2) defendant knew
19 or believed the representation to be false; (3) defendant intended to induce plaintiff to rely on the
20 misrepresentation; and (4) plaintiff suffered damages as a result of his reliance. *Barmettler v.*
21 *Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1386 (1998). In addition, Rule 9 requires a party to
22 “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). This
23 particularity requires “an account of the time, place, and specific content of the false
24 representations, as well as the identities of the parties to the misrepresentations.” *Swartz v.*
25 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *see also Morris v. Bank of Nev.*, 886 P.2d 454,
26 456 n.1 (Nev. 1994).

1 Plaintiff's claim for misrepresentation fails because it was not pled with specificity as
2 required by Rule 9(b). Nowhere in the Complaint does Plaintiff allege who made the fraudulent
3 statements, when the statements were made, or where they were made. Plaintiff also fails to
4 allege the specific content of the fraudulent statements—his allegations only include broad
5 generalizations. Plaintiff also fails to identify precisely what reliance Plaintiff placed on the
6 "misrepresentations" such that he is entitled to damages or equitable relief.

7 For example, paragraph 4 of the Complaint alleges that he "had a justified reliance on
8 truthfulness of ownership and proper assignments which was misrepresented by defendant's
9 account of ownership beneficiary through endorsements, assignments, and Notice of Default."
10 (ECF#1-1 at 5.) Plaintiff makes no factual allegation about who, when, or how Defendant
11 intentionally misrepresented its "account of ownership beneficiary." Instead, Plaintiff seems to
12 allege only that he was somehow misled by his reading of documents purporting to assign MERS'
13 beneficial interest in the Loan to Defendant. Plaintiff fails to indicate what specific content
14 within any of those documents constituted false representations, and how they were false. Even
15 assuming that Plaintiff has a justifiable reliance on the "truthfulness of ownership and proper
16 assignments," Plaintiff has failed to articulate what damages flow from the alleged untruthfulness
17 of ownership and improper assignments, assuming there were any of either.

18 Moreover, on the basis of the factual allegations in the Complaint, it is difficult to
19 understand how Plaintiff could have justifiably relied to his detriment on any alleged
20 misrepresentations in the loan documents. The Deed of Trust states that it and the Note "could be
21 sold one or more times without prior notice to [Plaintiff]." (ECF5-1 at 12-13, ¶ 20.) Plaintiff
22 signed the Deed of Trust, thereby accepting any subsequent assignment from MERS to a
23 subsequent purchaser of the Note. (ECF#5-1 at 15.)

24 Similarly, it is difficult to determine how Plaintiff could have justifiably relied on any
25 representations made in connection with the Loan's subsequent pooling and securitization. He
26 was not a party to those subsequent agreements, so no representations could have been made to
27 him. Even if misrepresentations were made in those agreements, Plaintiff has not shown how
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1 those misrepresentations caused him any harm. Moreover, if he defaulted on his Loan
 2 obligations, the beneficiary under the Deed of Trust could exercise its rights to foreclose. Thus, it
 3 is difficult to see how Plaintiff could have suffered any loss due to any misrepresentations
 4 contained in those agreements.

5 Because Plaintiff has failed to specifically plead facts sufficient to meet Rule 9(b)'s
 6 standard, the Court dismisses Plaintiffs' intentional misrepresentation claim, without prejudice.
 7 Plaintiff will have one opportunity to amend his Complaint to include sufficiently detailed factual
 8 allegations to satisfy Rule 9(b) and demonstrate the who, what, when, where, why and how of his
 9 claim for intentional misrepresentation.

10 C. Negligent Misrepresentation

11 Plaintiff also nakedly asserts a claim for "negligent misrepresentation." (ECF #1-1 at 5,
 12 ¶3.) This appears to be an alternative claim for relief, as he offers no facts to support this claim,
 13 other than those alleged in support of his claim of intentional misrepresentation.

14 In *Barmettler v. Reno Air, Inc.*, the Nevada Supreme Court adopted the definition of
 15 negligent misrepresentation from the Restatement (Second) of Torts § 552:

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 17 One who, in the course of his business, profession or employment,
 18 or in any other action in which he has a pecuniary interest, supplies
 19 false information for the guidance of others in their business
 20 transactions, is subject to liability for pecuniary loss caused to
 them by their justifiable reliance upon the information, if he fails to
 exercise reasonable care or competence in obtaining or
 communicating the information.

21 114 Nev. 441, 956 P.2d 1382, 1387 (1998). This federal district recognizes that negligent
 22 representation sounds in fraud, triggering the requirement under Rule 9(b) that the circumstances
 23 constituting fraud or mistake must be stated with particularity. *See Larson v. Homecomings Fin.*,
 24 *LLC*, 680 F. Supp. 2d 1230, 1234 (D. Nev. 2009) (plaintiffs' claim for negligent
 25 misrepresentation failed because it was not pled with specificity under Rule 9(b)); *Kennedy v.*
 26 *Carriage Cemetery Servs., Inc.*, 727 F. Supp. 2d 925, 931 (D. Nev. 2010); *Weingartner v. Chase*
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1 *Home Fin., LLC*, 702 F. Supp. 2d 1276, 1291 (D. Nev. 2010); *G.K. Las Vegas Ltd. P'ship v.*
2 *Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1222, 1244 (D. Nev. 2006).

3 As discussed above, Plaintiff fails to plead what information Defendant conveyed to him
4 that was false, and how he justifiably relied upon it.

5 Instead, Plaintiff merely alleges an element of the claim: that Plaintiff justifiably relied on the
6 truthfulness of ownership and proper assignments. This does not satisfy the requirements of Rule
7 9(b), *Iqbal* and *Twombly*. For these reasons, the claim is dismissed without prejudice.

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9 **CONCLUSION**

10 For the foregoing reasons, Defendant's Motion to Dismiss (ECF#5) is **GRANTED IN**
11 **PART**. Plaintiff's Complaint (ECF1-1) is **DISMISSED WITHOUT PREJUDICE**. Plaintiff
12 shall have 30 days from the date of entry of this Order in which to amend his Complaint to assert
13 sufficient facts to satisfy the pleading requirements of Rule 9 and *Iqbal* and *Twombly*. Should
14 Plaintiff not file an Amended Complaint by that date, this case will be closed.
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16 DATED this 23rd day of October, 2013.

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20 ANDREW P. GORDON
21 UNITED STATES DISTRICT JUDGE
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